


IN THE UNITED STATES DISTRICT COURT FILED BY  D.C.
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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CURTIS L. BYRD, JR.,

Plaintiff,

vs.

LESLIE I. BALLIN, et al.,

Defendants.

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
W.D. OF TN, MEMPHIS

No. 04-2998-D/P

ORDER GRANTING DEFENDANT NBC'S MOTION FOR SUMMARY JUDGMENT
ON THE STATE-LAW CLAIM

Plaintiff Curtis L. Byrd, Jr. commenced this action by filing a legal malpractice complaint in the Shelby County Circuit Court, docket number CT-005216-04, on September 13, 2004 against defendant Leslie I. Ballin, an attorney who represented Byrd in a federal criminal prosecution arising out of this district. See Notice of Removal, Ex. A. On or about November 15, 2004, plaintiff filed an amended complaint that, for the first time, added the National Bank of Commerce ("NBC") and three individuals, Sheila Burnett, Latoria Johnson, and Patricia Cook, as defendants. See Notice of Removal, Ex. B. NBC was served with the amended complaint on November 19, 2004 and removed this action to federal court, pursuant to 28 U.S.C. § 1446(d), on December 9, 2004.

On December 16, 2004, defendant NBC filed a motion for summary judgment, pursuant to Fed. R. Civ. P. 56, seeking dismissal of count 2 of the amended complaint, which asserted a claim pursuant

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to the Tennessee Financial Records Privacy Act (the "State Act"), Tenn. Code Ann. § 45-10-101 et seq.¹ NBC's motion was supported by the affidavit of Larry McCommon, NBC's custodian of records during the relevant time, which was sworn to on Dec. 16, 2004 ("McCommon Aff."), and a legal memorandum. Plaintiff filed a response to the motion on December 20, 2004.

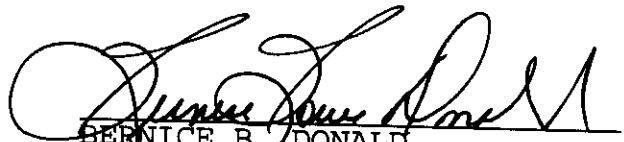
As plaintiff concedes, NBC plainly is entitled to summary judgment on the State Act claim in light of Walker v. White, 89 S.W.2d 573 (Tenn. Ct. App. 2002).² Although plaintiff, in his response, purports to voluntarily dismiss the claim pursuant to Fed. R. Civ. P. 41(a)(1)(i), that provision is inapplicable when a

¹ Count 3 of the amended complaint asserted a claim against NBC pursuant to the federal Right to Financial Privacy Act (the "Federal Act"), 12 U.S.C. § 3401 et seq. After the case was removed to federal court, plaintiff sought to voluntarily dismiss the claim under the Federal Act in an effort to divest this Court of jurisdiction. The validity of that attempt is addressed in a separate order which, for reasons not necessary to recount, concludes that the Federal Act claim remains in the case. At the time NBC filed its motion to dismiss, however, it had reason to believe that the only claim plaintiff intended to pursue arose under Tennessee law.

² Although defendant also argues that disclosures made pursuant to the grand jury subpoena are protected by Tenn. Code Ann. § 45-10-103(8), plaintiff responds that "the disclosures pursuant to the grand jury subpoena are not the disclosures he is challenging." Plaintiff's Response to "Motion for Summary Judgement" by NBC and Notice of Dismissal, filed Dec. 20, 2004 ("P. 12/20/04 S.J. Br."), at 1-2.

plaintiff seeks to dismiss fewer than all the claims against a party.³ Accordingly, the Court GRANTS NBC's motion for summary judgment dismissing count 2 of the amended complaint.⁴

IT IS SO ORDERED this 22 day of August, 2005.


BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

³ That matter is addressed in greater length in the order granting plaintiff's motion to withdraw his motion to remand the case to state court.

⁴ The other matters in plaintiff's response pertain to the validity of his Federal Act claim against NBC and his intention to file another amended complaint. Neither matter is at issue here.



Notice of Distribution

This notice confirms a copy of the document docketed as number 73 in case 2:04-CV-02998 was distributed by fax, mail, or direct printing on August 25, 2005 to the parties listed.

Richard Glassman
GLASSMAN EDWARDS WADE & WYATT, P.C.
26 N. Second Street
Memphis, TN 38103

Tim Edwards
GLASSMAN EDWARDS WADE & WYATT, P.C.
26 N. Second Street
Memphis, TN 38103

Jimmy Moore
CIRCUIT COURT, 30TH JUDICIAL DISTRICT
140 Adams Ave.
Rm. 224
Memphis, TN 38103

Curtis L. Byrd
1395 Worthington Circle
Memphis, TN 38114

Van Davis Turner
GLANKLER BROWN
One Commerce Sq.
Ste. 1700
Memphis, TN 38103

Larry Montgomery
GLANKLER BROWN, PLLC
One Commerce Square
Suite 1700
Memphis, TN 38103

R. Scott McCullough
GLASSMAN EDWARDS WADE & WYATT, P.C.
26 N. Second Street
Memphis, TN 38103

Honorable Bernice Donald
US DISTRICT COURT